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determine the law was in the court. But while the judiciary recognizes this right it does not enforce it. It recognizes it as a means for influencing, not for controlling, the action of the jury. The right exists for a legitimate legal purpose, but that purpose is not enforcement. The right is therefore an imperfect legal right, or a right subject to a procedural limitation. And when Justice Holmes, in *Horning's* case, says that the jury have a "technical right" to go against the law and the facts, he seems to be merely pointing out this imperfection which the law recognizes in the right of the court to determine the law. The "technical right" of the jury is only the restriction placed upon the right of the court. To say that the court has the right to determine the law but that the jury have the technical right to disregard it, appears to be only another way of saying that the court has the right to determine the law but has no means of enforcing its right against the jury.

If this was the situation in which the law placed the judge and the jury, it was incumbent upon the trial judge to explain it to the jury and not to mislead them by claiming not only the right to determine the law, which he had, but also the right of enforcement, which he did not have. The judge did explain this to the jury. He told them that it was their legal duty to find the defendant guilty, but that he was not permitted by the law to compel them to perform that duty. He made it sufficiently clear that their duty was imperfect in its obligation and was unenforceable by the court. This was entirely consistent with the case of *Sparf and Hansen*.

Justice Brandeis disapproved of the action of the trial court because he believed it amounted to a moral command to convict the defendant. If there was error here, the fault lay, not in telling the jury that they ought to convict, but in failing to make it perfectly clear that the law left the performance or non-performance of this legal duty wholly to the conscience of the jury. In other words, the moral command, if there was one, consisted in the failure to disclose the unenforceable and imperfect character of the duty to follow the law as given by the court. It was at most a moral advantage taken by the court resulting from an incomplete and misleading statement of the nature of the legal duty resting upon the jury,—the same sort of moral compulsion which frequently flows from incomplete instructions. But there is nothing in this dissenting opinion, any more than in the prevailing opinion, which conflicts with the *Sparf and Hansen* case. E. R. S.

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CITY PLANNING—LOCATION OF STREETS AND ESTABLISHMENT OF BUILDING LINES.—In 1917, Connecticut, by law authorized Windsor to create a town planning commission "to make surveys and maps, section by section \* \* \* showing locations for any public buildings, highways, or streets, including street building and veranda lines." Such map was to be filed in the town clerk's office, and notice given to the owners for a hearing; after such hearing, the commission was to decide, and file a map in accord with its decision; a right of appeal to court was reserved to an aggrieved party; and no street was to be opened until the land necessary was appropriated under eminent domain proceedings. A town planning commission was appointed, and made

plans, under this statute. The defendant, in developing a tract of land for residential purposes, in Windsor, laid out streets, fixed building lines, and began selling lots, without conforming to the commission plans. The city sued to restrain him from proceeding according to his own plans. He demurred on the ground that the act authorized a taking of his property without due process of law. The trial court so held. On appeal, reversed. *Town of Windsor v. Whitney*, (Conn., Aug. 5, 1920), 111 Atl. 354.

Wheeler, J., speaking for the majority, says: "This does not physically take the land, but it regulates its use, and hence deprives the owner of a part of his dominion over his land. The owner may not lay out streets through this land where he chooses and of the width he chooses. Nor may he establish the building lines where he wills. There is no provision in the act for compensation. \* \* \* Unless this regulation can be supported as a legitimate exercise of the police power the act must fall. A town commission plan \* \* \* is distinctly for the public welfare. \* \* \* In such a plan each street will be properly related to every other street. Building lines will be established where the demands of the public require. Adequate space for light and air will be given. Such a plan is a wise provision for the future. It betters the safety and health of the community; it betters the transportation facilities; and it adds to the appearance and wholesomeness of the place, and as a consequence it reacts upon the morals and spiritual power of the people who live under such surroundings."

Gager, J., dissented, holding that the establishment of a building line was a taking of property for which compensation must be made, relying on and citing *City of St. Louis v. Hill*, 116 Mo. 527; *Northrop v. Waterbury*, 81 Conn. 309; *Benedict v. Pettes*, 85 Conn. 537. And this seems to be according to the weight of authority: *Eubank v. Richmond*, (1912), 226 U. S. 137, Ann. Cas. 1914B, 192, with note; *Fruth v. Board of Affairs*, (1915), 75 W. Va. 456.

It was only in reference to the building line provisions that Judge Gager dissented. The case therefore stands for the rule that a city may lay out streets over or across the land of another, and the land owner must conform to such lay-out, in disposing of his lots, although the city has not opened the street, and may not do so for a long time. In this particular it resembles the early case of *In the Matter of Furman Street* (1836), 17 Wend., N. Y., 649. Here the legislature of New York authorized the village of Brooklyn to lay out streets and file a map thereof. It did so in 1819. In 1833, one of the streets so laid out was first opened; in the meantime buildings had been erected within the street as originally mapped, and it was held the owner was not entitled to any compensation for the destruction of his building when the street was actually opened seventeen years after its location. This case, however, was overruled by the Court of Appeals, in *Forster v. Scott*, (1882) 136 N. Y. 577, 583, and this was followed on a similar state of facts in *Edwards v. Bruorton*, (1904), 184 Mass. 529, 532.

Pennsylvania, on the other hand, early followed the *Furman St.* case, and continues to do so: *In Forbes Street*, (1871), 70 Pa. St. 125, 137; *Bush v. McKeesport*, (1895), 166 Pa. 57; *Harrison's Estate*, (1915), 250 Pa. 129;

*Philadelphia Parkway*, (1915), 250 Pa. 257; *Dintman v. City of Harrisburg*, (1919), — Pa. —, 108 Atl. 724, 725.

See for full discussion of recent cases on zoning, 19 MICH. L. REV. 191.  
H. L. W.

CONCURRENT POWER UNDER THE EIGHTEENTH AMENDMENT.—The two main questions which have been considered in making the decisions under the Eighteenth Amendment are whether or not state provisions for referendum of legislative action can be applied to ratification of proposed amendments to the Federal Constitution, *Hawke v. Smith*, (1920), 251 U. S. —, 40 Sup. Ct. 495, and what the interpretation of the second section of the amendment is to be, in giving the states 'concurrent power' to enforce the Amendment by legislation, along with Congress. *State of Rhode Island v. Palmer*, (1920), 40 Sup. Ct. 486. *Hawke v. Smith* reversed the decision (below) in the Ohio Supreme Court, 126 N. E. 400, which had held that the referendum applied. See note on the decision in the Ohio court in 18 MICH. L. REV. 698. The Supreme Court decided that the fifth Article of the Constitution, providing for methods of amendment, is a grant of authority by the people to Congress; hence, the authority given to the state legislatures to ratify is given to specific bodies as an expression of assent, rather than legislative action, so that the referendum cannot apply. See a forecast of this view in a Note and Comment in 18 MICH. L. REV. 51. *Davis v. Hildebrant*, 241 U. S. 565, which held that the referendum provision of the state constitution applied to a law redistricting the state with a view to representation in Congress was distinguished on the ground that that was legislative action by the state, to which the referendum properly applied. For an exposition of the cases of *Hawke v. Smith* and *Rhode Island v. Palmer*, *supra*, see article by Thomas R. Powell, "Constitutional Law in 1919-1920," 19 MICH. L. REV., pp. 2-8. On the Eighteenth Amendment as a whole, see article by George D. Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment," 18 MICH. L. REV. 213.

In *Rhode Island v. Palmer*, the opinion of the Court gave no reasons for the decision, setting a new precedent in giving practically a memorandum opinion in a case of wide importance. It held that the words 'concurrent power' do not mean joint power, nor that legislation by Congress must be approved by the states, nor that the power should be divided between Congress and the several states along the lines of activity in inter and intra-state commerce regulations.

Justice McKenna, in a separate opinion, interprets section 2 of the Amendment to mean 'coincident or united action'; there must be concordant action in Congress and the states, and he looks hopefully to the sentiment which produced the Amendment to give harmonious legislation in Congress and the states. The giving of concurrent power to both Congress and the states expressly is entirely new in the Constitution. Any argument must necessarily be based on more or less remote analogy. Perhaps concordant action as demanded by Justice McKenna is possible. In *Ex parte Siebold*, 100 U. S. 371, at page 391, Justice Bradley, in discussing the power given to the states